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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TOOL AND
MANUFACTURING COMPANY, INC.,

Petitioner,

vs.

VINCENT LEPORE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY**

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QUESTIONS PRESENTED

1. Whether a State can use the Occupational Safety and Health Act as a basis for determining that an independent state cause of action exists and thereafter disregard the procedure and remedy mandated by the Occupational Safety and Health Act and the regulations promulgated thereunder.

2. Whether an employee covered by a collective bargaining agreement may avoid binding arbitration as called for by the terms of the agreement and bring an individual action alleging violations of independent state law where the independent state law violation is premised on a federal statute which defers to the arbitration process by specific federal regulation.

3. Whether a cause of action for violations of state public policy can be found to exist in circumstances where a federal statute from which the state public policy is said to emanate, and is premised upon, provides for a specific remedy and procedure for the precise violation alleged, or whether a private right of action is foreclosed and preempted by the availability of such a remedy.

4. Whether an independent state cause of action is maintainable pursuant to the dictates of Lingle v. Norge which allows the plaintiff, under certain circumstances, to avoid mandatory binding arbitration under the terms of a collective bargaining agreement or whether said claims are preempted by the Labor Management Relations Act where the independent state claims are premised upon a federal

statute and regulations promulgated there-
to which specifically provide that such
claims are deferred to the mandated arbi-
tration process and which do not provide
an independent private right of action for
such retaliation claims.



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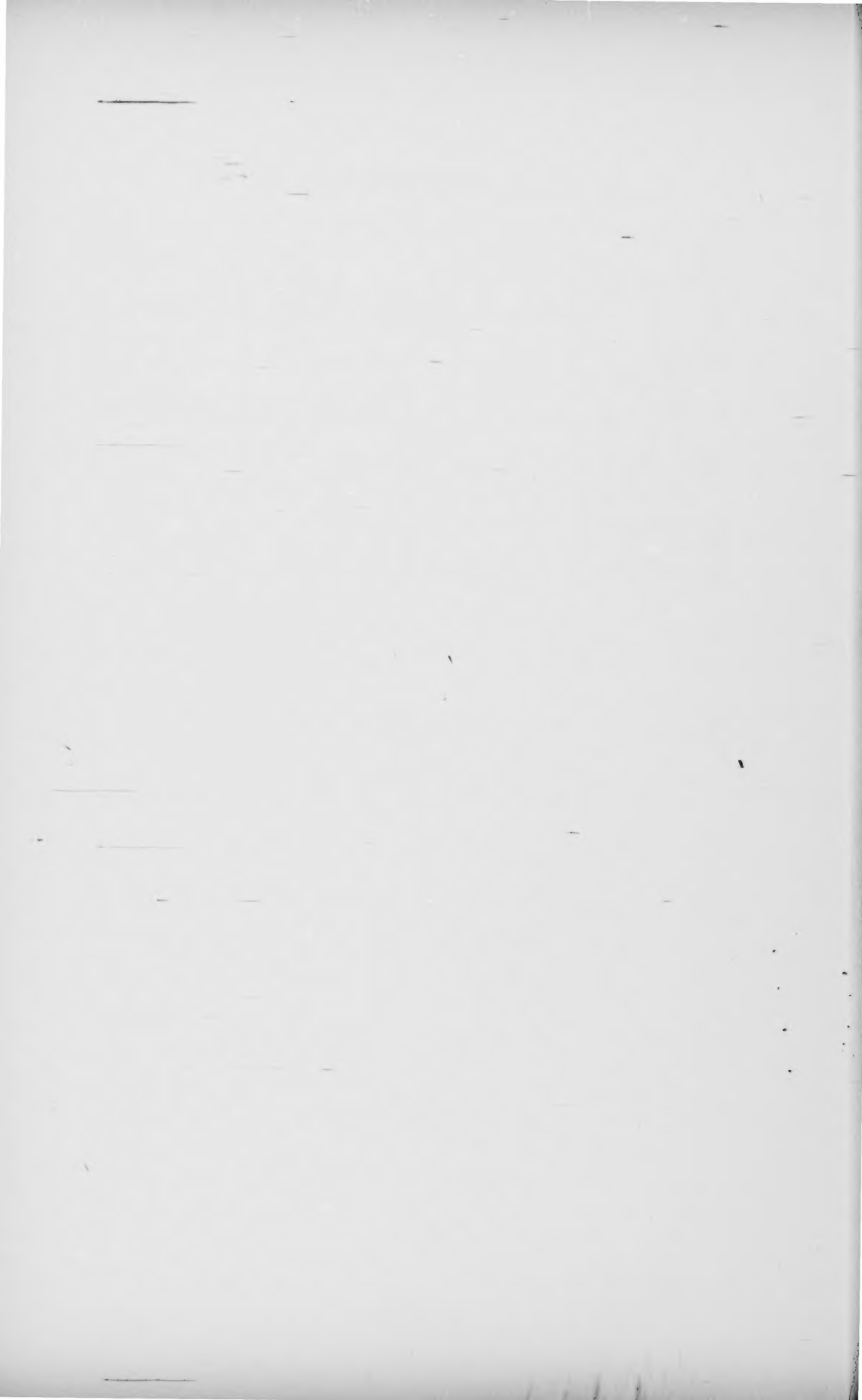
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October Term, 1989

NATIONAL TOOL AND MANUFACTURING
COMPANY, INC.,

Petitioner,

— -VS-

VINCENT LEPORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

National Tool and Manufacturing
Company, Inc., petitions for a Writ of
Certiorari to review the judgment of the
New Jersey Supreme Court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App. infra, 1a) is reported at 115 N.J. 226. The decision of the New Jersey Appellate Division (App. infra, 6a) is reported at 224 N.J. Super. 463. The decision and Order granting Summary Judgment of the New Jersey Law Division (App. infra, 55a) is unreported.

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on May 15, 1989. The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Relevant provisions of the Occupational Safety and Health Act, 29 U.S.C. § 651, et seq. and the Labor Management

Relations Act, 29 U.S.C. § 185 et seq. are reprinted at App., infra, 57a and 61a respectively.

STATEMENT

1. The Supreme Court of New Jersey has held that an employee covered by a collective bargaining agreement could bring an action for wrongful discharge that violates independent state law where the independent state law is essentially based upon a federal law, the Occupational Safety and Health Act (hereinafter referred to as "OSH Act"), which provides a specific procedure and remedy pursuant to express regulations promulgated thereunder and which in fact provides for deferral to the binding arbitration procedure under the collective bargaining agreement. The OSH Act does not permit private rights of action in the courts. Correspondingly, an

issue which evolves out of the above is whether a state can use a federal statute as a basis for determining that an independent state cause of action exists, then disregard the procedure and remedy mandated by the federal statute, in this case the OSH Act, and the regulations promulgated thereunder. The Petitioner herein provides a concise statement of the case containing the facts material to consideration of the questions presented along with the method and manner in which these questions were dealt with by the New Jersey Supreme Court and trial and appellate level New Jersey courts involved in this matter.

2. The Petitioner in the instant matter is a manufacturer of moldsets for the plastic industry with a plant located in Kenilworth, New Jersey. The plaintiff commenced employment with the company as

an assembly-inspection worker on September 17, 1981. Plaintiff, at all times herein, was a member of Teamsters Local 97 of New Jersey and covered by an existing collective bargaining agreement. The collective bargaining agreement provided that Teamsters Local 97 was the exclusive bargaining agent for all production and maintenance employees at the company, including plaintiff. The collective bargaining agreement also contained negotiated safety provisions, negotiated rules of conduct providing for progressive discipline up to and including discharge, and a binding grievance and arbitration procedure under the auspices of the New Jersey State Board of Mediation.

Plaintiff was terminated on April 6, 1983 for violations of certain rules contained in the progressive discipline system negotiated with the union.

Essentially, the plaintiff had received a series of warnings which resulted from violations of negotiated and posted company rules and regulations, and pursuant to the dictates of the progressive discipline system mentioned above, plaintiff was discharged on April 6, 1983.

In April, 1983, plaintiff filed several grievances under the collective bargaining agreement asserting that his severance from Petitioner was a result of his having filed a complaint against the company alleging violations of OSH Act Regulations by the company. In June of 1983, subsequent to his submission of the dispute concerning his discharge to the binding arbitration procedure mandated by the contract and set up under the auspices of the New Jersey State Board of Mediation, Mr. Lepore filed a complaint with the Occupational Health & Safety Administra-

tion claiming that his termination was a violation of the retaliatory discharge provision found in § 11(c) of the Occupational Health & Safety Act. The plaintiff also filed a complaint with the National Labor Relations Board alleging that he had been discriminated against for engaging in union activities. The Company has steadfastly denied that Mr. Lepore was retaliated against or discriminated against in any way for allegedly filing a complaint with OSHA or for allegedly engaging in union activities.

By letter of August 3, 1983, Mr. Lepore was advised by OSHA that pursuant to 29 C.F.R. 1977, § 18(b) and (c), that the discrimination charge under § 11(c) of the OSH Act would be deferred to the arbitration procedures under the collective bargaining agreement. Correspondingly,

similar notice was given to Mr. Lepore regarding the discrimination charge that he had filed before the NLRB in accordance with Dubo Mfg. Co., 142 N.L.R.B. 421, 53 L.R.R.M. 1070 (1963).

Plaintiff, after filing his grievance pursuant to the collective bargaining agreement and commencing the arbitration proceedings thereunder, filed a complaint in the Superior Court of New Jersey on March 22, 1984, alleging that his termination was wrongful and that it was allegedly in retaliation for filing a complaint with OSHA. Several days of arbitration hearings took place but have not concluded due to the pendency of this suit, at the behest of Mr. Lepore.

Defendant made a motion to dismiss plaintiff's complaint or, alternatively, for summary judgment before the New Jersey Superior Court, Law Division (Harry D.

Osborne, Jr., J.S.C.). Defendant's motion was denied with respect to both requests for relief. Subsequent to the denial of defendant's motion, the Supreme Court of the United States issued its decision in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). The Allis-Chalmers case addressed state tort claims by union employees. Several other state and federal courts issued decisions during this time period which supported defendant's position. Based upon the changed circumstances in the substantive law effecting the within matter, the defendant renewed its motion. The Superior Court of New Jersey, Law Division (Honorable John M. Boyle, J.S.C.) considered and thereafter granted defendant's renewed motion for summary judgment. Plaintiff appealed this judgment.

By decision dated April 11, 1988, the Superior Court of New Jersey, Appellate Division, reversed the decision of the Superior Court, Law Division and remanded for further proceedings. Lepore v. National Tool & Mfg. Co., 224 N.J. Super. 463 (App. Div. 1988).

The Superior Court of New Jersey, Appellate Division, held that a tort remedy for the discharge of a union employee in retaliation for reporting work place safety violations to the Occupational Safety and Health Administration existed and based the existence of such a remedy on a state public policy which it established by referring to federal statutory law. The Appellate Division further stated that state court litigation of such a retaliatory discharge claim is not preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 et

seq., nor is it preempted by the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.

The defendant requested Certification to the Supreme Court of New Jersey which was granted. The Supreme Court of New Jersey, in its per curiam opinion, stated that "we affirm substantially for the reason set forth in Judge Connelly's thoughtful opinion." Lepore v. National Tool & Mfg. Co., 115 N.J. 226 (1989). In so doing, the Court totally ignored the argument of defendant which contended that the Occupational Safety and Health Act preempted the cause of action, not even mentioning it in their opinion except by referring to the "reasons set forth" in the opinion below and further relied upon a previously undefined and inapplicable series of state statutes and cases in finding that an independent state cause of

action existed when an employee is allegedly retaliated against for filing a complaint with OSHA, despite the express mandate of OSH Act regulations that the claim be processed by binding arbitration under the collective bargaining agreement and the fact that no private right of action exists under the OSH Act for such an alleged violation.

Following this conclusion, the New Jersey Supreme Court remanded this case to the New Jersey Superior Court, Law Division to proceed forward with the litigation, which has been stayed by the Assignment Judge pending this Petition.

REASONS FOR GRANTING THE WRIT

At the outset, it is important to note that the decision of the New Jersey Supreme Court is ripe for review by this court. 28 U.S.C. § 1257 gives this court statutory authority to review the final judgment of any state supreme court. Although the New Jersey Supreme Court remanded this case for a trial on the merits, such a remand is not fatal to a review by certiorari. It is a well established exception to the general rule that when the federal issues as determined by the highest state court will survive any possible outcome of future state court proceedings, certiorari will lie. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480 (1975). This is in keeping with the earlier holding of this court warning against a too mechanical application of

this rule. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).

1. In reaching its result, by affirming the opinion of the Appellate Division of the New Jersey Superior Court, the Supreme Court of New Jersey misconstrued the application of federal law set forth by the Third Circuit Court of Appeals in Wolk v. Saks Fifth Avenue Inc., 728 F.2d 221 (3d Cir. 1984). Due to the absence of any separate identifiable state statutory remedy, plaintiff's exclusive statutory remedy was set forth under the Occupational Safety and Health Act which specifically defers such claims by federal regulation to the mandated binding arbitration process under the collective bargaining agreement. In Wolk, the Third Circuit held that a claim for wrongful discharge under common law may only be maintained in the absence of such a statu-

tory remedy. Id. at 223, citing Bruffet v. Warner Communications, Inc., 692 F.2d 910, 912 (3d Cir. 1982). Since the Occupational Safety and Health Act provides for a specific procedure and remedy for plaintiff in the within instance, any state public policy claim must fail. See, Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (holding that remedies for discharge for complaining about mine safety conditions were provided by the collective bargaining agreement and the Federal Mine Safety and Health Act, 30 U.S.C.A. § 801-926 (West Supp. 1983) and not by state law or public policy).

In addition to the Wolk decision, other courts in the Third Circuit have found that a state public policy cause of action should not arise where there exists a federal statute which already carries a

remedy for the precise violation alleged. Kennard v. Lewis Zimmer Communities, Inc., 632 F. Supp. 635 (E.D.Pa. 1986), 639 (note 3) citing, Novosel v. Nationwide Insurance Company, 721 F.2d 894 (3d Cir. 1983), Braun v. Kelsey-Hayes Co., 635 F. Supp. 75 (E.D.Pa. 1986); Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D.Pa. 1984); Bruffet v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982); Murray v. Commercial Union Ins. Co., 782 F.2d 432 (3d Cir. 1986); Woodson v. AMF Leisure Land Center, Inc., 842 F.2d 699 (3d Cir. 1988); Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D.Pa. 1977).

In Braun v. Kelsey-Hayes Co., *supra*, the plaintiff filed a suit alleging wrongful discharge against his employer. Specifically, the plaintiff claimed his discharge was in violation of the public policy of Pennsylvania which he stated

"favors safe and healthy working environments for employees ...". 635 F. Supp. at 79. The plaintiff contended that this public policy was premised upon and manifested from, inter alia, the Osh Act, 29 U.S.C. § 651 et seq. The defendant argued that plaintiff's cause of action was preempted by the OSH Act regardless of whether or not common law rights protecting against such actions existed. 635 F. Supp. at 79. The court in holding for the defendant stated:

OSHA, 29 U.S.C.A. § 660(c) (1), and the Toxic Substance Control Act, 15 U.S.C.A. § 2622 (West 1982 & Supp. 1985), provide specific remedies for corporate retaliation against employees who participate in any action to carry out the purpose of the federal statutes. See also 29 C.F.R. §§ 24.1-24.9 (1985). The statutory remedies are exclusive: they provide for the filing of a complaint with the Secretary of Labor and there is no private right of action. See Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980). Id. at 80.

The Court went on to later state:

This statutory remedy is exclusive and preemptive of any state tort action. Wolk v. Safe Fifth Ave., Inc., 728 F.2d 221 (3d Cir. 1984). In Wolk, the Third Circuit held that a claim for wrongful discharge under common law may only be maintained in the absence of a statutory remedy. Wolk, 728 F.2d at 223. The court noted therein that the "only Pennsylvania cases applying the public policy exceptions [to create a wrongful discharge claim] have done so where no statutory remedies were available." Wolk, 728 F.2d at 223, quoting, Bruffett v. Warner Communications, Inc., 692 F.2d 910, 912 (3d Cir. 1982). Since OSHA provides a remedy for employees that claim retaliatory termination, the plaintiff cannot maintain his wrongful discharge action against the defendant. See, Walsh v. Consolidated Freightways, Inc., 278 Or. 347, 563 P.2d 1205 (1977). In Walsh, the Supreme Court of Oregon held that the plaintiff could not maintain a cause of action for wrongful discharge, because the alleged retaliatory nature of the defendant's conduct fell within the remedies afforded plaintiff in Section 11(c) of OSHA, even though Walsh never in fact reported or threatened to report the alleged safety hazards to OSHA.

Under the facts of the matter sub judice, the remedies and procedures mandated by the specific federal law must surely have primacy.

Similar questions have arisen recently under the Age Discrimination and Employment Act. On March 13, 1989, the Fourth Circuit Court of Appeals announced its decision in Zombro v. Baltimore City Police Department, 868 F.2d 1364 (4th Cir. 1989). In that case, the Court rejected a plaintiffs claim which attempted to identify the Age Discrimination and Employment Act, 28 U.S.C. Section 621, as his asserted legal basis for a violation of his substantive rights under 42 U.S.C. 1983. Plaintiff had bypassed the administrative procedures mandated by the ADEA and filed an action directly in federal court under 42 U.S.C. 1983. The Fourth Circuit affirmed the grant by the District Court of

the defendants' Motion for Summary Judgment, stating as follows:

If a violation of substantive rights under the ADEA could be asserted by way of a 1983 action, the aggrieved party could avoid these specific provisions of the law. The plaintiff would have direct and immediate access to the federal courts, the comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded. The purposes and structure of the ADEA are inconsistent with the notion that the remedies it affords could be supplanted by alternative judicial relief. The inescapable conclusion to be drawn from the foregoing is that if 42 U.S.C. 1983 is available to the ADEA litigant, the congressional scheme behind ADEA enforcement could easily be undermined, if not destroyed. The very object of bypassing the specific administrative process of the ADEA, one thus assumes, was the principal reason why this action was not brought under the ADEA.

The overriding question presented by this case is whether the availability and detailed procedures of the ADEA foreclose a private action brought under 1983 to enforce substantive rights specifically addressed

and protected by the ADEA. May the plaintiff, in other words, cavalierly bypass the comprehensive process fashioned by Congress in the ADEA by merely asserting a violation of a constitutional right rather than the statutory right? Section 1983, standing alone, cannot withstand preemption by a more comprehensive statutory remedy designed to redress specific unlawful actions, such as those alleged by Zombro, unless the statute in question manifests a congressional intent to allow an individual a choice of pursuing independently rights under both the statutory scheme and some other applicable federal statute. In Middlesex City Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981), the Supreme Court instructed that "when [the state] is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." *Id.* at 20, quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting).

It is respectfully submitted that the above reasoning is analogous to the within case. As argued by the petitioner,

National Tool herein, Mr. Lepore should not be allowed to bypass the statutory and judicially mandated processes of the collective bargaining agreement under the Occupational Safety and Health Act by virtue of the fact that specific federal regulation mandates a deferral of a claim for retaliation for filing an OSHA complaint to the binding arbitration process under the collective bargaining agreement. Further, the Occupational Safety and Health Act which is the premise of his entire action, provides no independent basis for a private cause of action for such an alleged violation. Yet the essence of what Mr. Lepore alleges he did and for which he was retaliated against is solely that he complained to OSHA. He had no other place to complain about alleged safety conditions since the State of New Jersey in fact formally abandoned all

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regulatory activities in this regard. As of April 1, 1975, Joseph A. Hoffman, Commissioner of the New Jersey State Department of Labor and Industry, announced the withdrawal of the New Jersey State Plan for Occupational Safety and Health and thereupon jurisdiction vested fully with the U.S. Department of Labor for the regulation of occupational safety and health under the Federal OSH Act of 1970, 29 U.S.C. § 651, et seq. See N.J.A.C. 12:110-116. By doing so, New Jersey made the federal act the sole vehicle for regulation, compliance, and any allegation of retaliation.

What the Supreme Court of New Jersey has done, in affirming the decision of the Appellate Division of the Superior Court of New Jersey, is to fashion an independent state cause of action based upon the federal statute and regulation, then sup-

tory mandated process and remedy under the very federal statute and regulation which is the foundation of the cause of action. Thus, the entire machinery contemplated by the federal statute in adjudicating a dispute for which no private cause of action exists under the federal statute, is now effectively eliminated by the existence of an action in the state trial courts under state common law even though the state by specific administrative action deferred the entire OSH procedure to the federal court and its enforcement process. One cannot imagine a clearer case of bootstrapping to a result not contemplated by federal law, or even the state officials who decided to rely on federal rather than state law to enforce concerns for occupational safety and health in the first

place. The New Jersey courts have not shown a clearly different purpose between their newly created cause of action and the regulation of workplace safety provided by the OSH Act. The goal of both is to protect workers from workplace hazards. To the extent that New Jersey courts desire to regulate conduct in the workplace and supersede the procedures and remedies provided for under the OSH Act, a legitimate and substantial purpose must be shown. Failing to do so causes such regulation and/or remedies to be preempted by the OSH Act. See, Michigan v. Hegedus, No. 83601 (Mich. Sup. Ct. July 3, 1989); Illinois v. Chicago Magnet Wire Corp., 126 Ill.2d 356, 534 N.E.2d 962 (1989).

It is respectfully submitted that this case deserves the consideration of this Court to protect the federal scheme of labor relations law referenced and

relied upon by the Occupational Safety and Health Act and regulations promulgated thereto since the federal scheme for providing for a right to employees under federal law and encompassing the specific means of dispute resolution and redress mandated by that federal law should not be perfunctorily cast aside in the rush to create independent state causes of action which rely entirely upon an alleged federal violation. What is in question in these proceedings if one adopts arguendo the position of Mr. Lepore is plainly and simply whether he was retaliated against for filing a complaint with OSHA. No process of the state or state agency was involved. Therefore, specific federal law addressing the situation should be adhered to.

2. It is respectfully submitted that the nature of the within action,

being premised upon alleged retaliation under the Occupational Safety and Health Act which, as indicated supra specifically defers the complaint to the mandated binding arbitration procedures under the collective bargaining agreement, constitutes an exception to this Court's decision in Lingle v. Norge Division of Magic Chef, Inc., 108 S. Ct. 1877 (1988) such that the within cause of action is also independently preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

In this case, the allegations are not only inextricably intertwined with interpretations of the collective bargaining agreement as set forth in Allis - Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), but, are fashioned upon a cause of action which emanates specifically from a federal statute, the Occupational Safety and Health Act, which is the basis of the plaintiff's

claim in the first place and which is the basis for the allegedly independent state cause of action which the Supreme Court of New Jersey fashioned to avoid the deferral to the mandated binding arbitration process under the collective bargaining agreement as specifically set forth in federal regulations. 29 C.F.R. 1977 § 18(b) and (c). The collective bargaining agreement, which contains and perhaps subsumes the protections afforded by the OSH Act, provides the same, if not greater, protection of job security than the newly created state public policy is seeking to provide unionized employees and accordingly preemption is proper. Comment, NLRA Preemption of State Wrongful Discharge Claims, 34 Hastings L.J. 635, 660 (1983).

The decision of the Superior Court of New Jersey, Appellate Division, which was

adopted by the Supreme Court of New Jersey, goes even further in disregarding and doing violence to federal law including, but not limited to, the Steelworkers Trilogy, United Steel Workers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steel Workers of America v. American Manufacturing Company, 363 U.S. 564, 567-569 (1960); and United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 582-3 (1960), wherein at footnote 2, p. 4, the Appellate Division states the following:

Arbitration proceedings were begun but not completed, having been adjourned at plaintiff's request pending this appeal. As a result of our opinion, plaintiff's state court complaint will be reinstated. We would expect him to abandon his arbitration remedy.

Thus, it would appear that the courts of New Jersey have indicated that the

negotiated binding arbitration process for dispute resolution under the collective bargaining agreement may be totally disregarded despite the long line of cases describing this process as a keystone to industrial relations and despite the federally mandated deferral to this process under the Occupational Safety and Health Act in an instance where, as in this case, plaintiff claims that he was retaliated against by being terminated due to his reporting of a complaint to the Occupational and Safety Health Act and wherein the company contends that his termination was based upon violation of rules under a progressive discipline system specifically negotiated with the union who represents him. The within scenario represents the classic example of when preemption becomes essential to prevent state laws from interfering with or breaching well-estab-

lished federal policies. Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1473 (9th Cir. 1984); San Diego Trades Council v. Garmon, 359 U.S. 236, 241-45 (1959).

This matter further provides the Court herein with the opportunity to clarify the issue of the preemption of state law claims by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the OSH Act, 29 U.S.C. § 651, et seq., which continues to vex the courts and burden employers covered thereunder. Compare, Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221 (3d Cir. 1984), where the Third Circuit provided that a claim for wrongful discharge under the common law may be maintained only in the absence of a statutory remedy, and Smolarek v. Chrysler Corp., No. 86-2074 (6th Cir. July 12, 1989) (en banc) where the Sixth Circuit

held that unionized employees claims asserting violations of the Michigan Handicappers' Civil Rights Act are not preempted by § 301 of the Labor Management Relations Act.

We are not here considering a case where there is an independent state cause of action as asserted in Lingle v. Norge, supra, concerning retaliation for filing a workers compensation complaint under state law. What we are talking about here specifically is an alleged violation for filing a complaint with a federal agency wherein the federal Occupational Safety and Health Act specifically contains a regulation promulgated thereto deferring to the collective bargaining binding arbitration process and where no private cause of action exists under federal law, coupled with the arbitration issue of whether plaintiff was discharged for just

cause under the negotiated progressive-discipline system.

It is respectfully submitted that under these particular facts and these particular circumstances, that there is a dual preemption by both the Occupational Safety and Health Act and under the Labor Management Relations Act since the rights which plaintiff asserts are premised upon federal law which specifically contemplates and mandates adherence to the procedures and remedies set forth in the binding arbitration process specifically negotiated under the collective bargaining agreement.

CONCLUSION

Wherefore, Petitioner, National Tool and Manufacturing Co., Inc., respectfully requests the Supreme Court of the United States to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

WAYNE J. POSITAN

General Counsel

WAYNE J. POSITAN

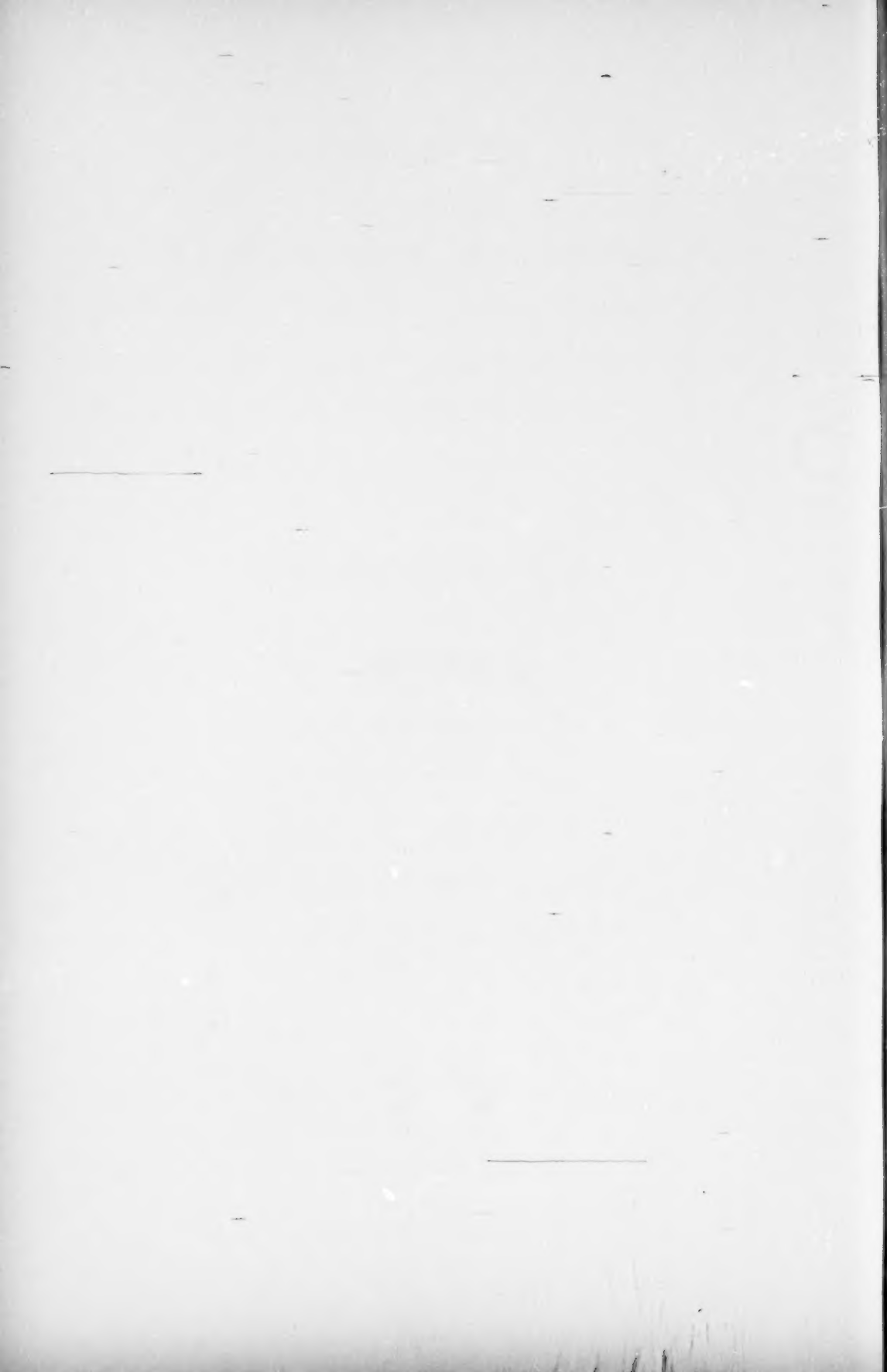
DOMENICK CARMAGNOLA

LUM, HOENS, CONANT & DANZIS

Attorneys for Petitioner

August 10, 1989

APPENDIX



APPENDIX A - OPINION OF
SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY

VINCENT LEPORE, PLAINTIFF-RESPONDENT
v. NATIONAL TOOL AND MANUFACTURING COMPANY
DEFENDANT-APPELLANT

Argued March 13, 1989
Decided May 15, 1989

PER CURIAM

We affirm substantially for reasons set forth in Judge Conley's thoughtful opinion. In affirming, we note that the Appellate Division opinion is supported by the subsequent decision of the United States Supreme Court in Lingle v. Norge Division of Magic Chef, Inc., ___ U.S. ___, ___, 108 S.Ct. 1877, 1883, 100 L.Ed.2d 410, 420-21 (1988). There, the Court held that an employee covered by a collective-bargaining agreement could bring an action for wrongful discharge

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that violates independent state law. Here, the Appellate Division concluded that at the time of respondent's discharge, state law, as well as federal law, prevented an employer from discharging an employee for reporting workplace safety violations. 224 N.J. Super. 463, 468-70 (1988). Under Lingle, respondent's cause of action has an independent basis in state law. ___ U.S. at ___ n. 6, 108 S.Ct. at 1882 n. 6, 100 L.Ed.2d at 419 n. 6.

It would be anomalous, moreover, to afford protection to all employees, including those covered by a collective-bargaining agreement, who are terminated after the effective date of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8, and to at-will employees terminated prior to the Act under the common law, but not to covered employees

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who are fired prior to the Act. Our recognition of a common-law cause of action for covered employees merely closes a narrow gap between the protection granted by the statute and our earlier decision in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), which dealt with at-will employees.

Referring to the Act, the Appellate Division stated:

Although enacted after the retaliatory discharge here and, thus, not directly applicable, we view this legislation as a reaffirmation of this state's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a preexisting common-law tort cause of action for such retaliatory discharge.

[224 N.J. super. at 470 (citations omitted.)]

The fact that plaintiff was covered by a collective bargaining agreement, moreover, should not preclude a cause of

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action predicated on an independent basis. As Lingle makes clear, a suit based on an independent state cause of action does not undermine a collective-bargaining agreement.

We have taken account of defendant's argument that the result conflicts with general legislative policies of achieving labor peace and the just resolution of disputes through the collective-bargaining process. In this instance, however, the Legislature has chosen to provide an alternative to the remedies provided in the collective-bargaining agreement. See Thornton v. Potamkin Chevrolet, 94 N.J. 1 (1983 (enforcement of New Jersey's law against discrimination and the collective-bargaining process complement rather than conflict with each other)).

To conclude, an employee covered by a collective-bargaining agreement, like an

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at-will employee, should be allowed to maintain an action for a wrongful discharge made in retaliation for reporting safety and health violations.

The judgment of the Appellate Division is affirmed.

For affirmance - Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN - 7.

Opposed - None.

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APPENDIX B - DECISION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

VINCENT LEPORE, PLAINTIFF-RESPONDENT
v. NATIONAL TOOL AND MANUFACTURING COMPANY
DEFENDANT-APPELLANT

Argued February 2, 1988
Decided April 11, 1988

CONLEY, J.S.C. (temporarily assigned).

This is an appeal by a union employee from a summary judgment dismissing his state court retaliatory discharge complaint against his former employer. It raises three significant issues not previously addressed in this State: (1) whether there exists a tort remedy for the discharge of a union employee in retaliation for reporting workplace safety violations to the Occupational Safety and Health Administration; (2) whether state court litigation of such retaliatory

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discharge is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA); (3) whether state court litigation of such retaliatory discharge is preempted by the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (OSHA). We hold that an employee under a collective bargaining agreement may seek redress in our courts for a discharge in retaliation for reporting workplace safety violations. We further hold that a tort remedy for such retaliatory discharge is not preempted by either LMRA or OSHA.

Plaintiff was employed by defendant National Tool and Manufacturing Company (hereinafter National) for two years before his discharge in April 1983 and had, prior thereto, received both a merit raise and a contractual increase. In his complaint, the allegations of which must be accepted as true, he alleges that after

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being on the job for about a year and a half he noticed that defendant's plant was being operated in an unsafe manner and reported the conditions to OSHA. Upon inspection, OSHA found several violations and ordered National to correct them. The complaint further alleges that when National learned plaintiff was the "whistle-blower", it took reprisal action against him, first by demoting him to an inferior position outside his job classification and then discharging him. The collective bargaining agreement then in effect protected an employee such as plaintiff from discharge or discipline without just cause and provided for final and binding arbitration.¹ Plaintiff filed

¹In this respect, Art. VII of the contract provided:

(Footnote Continued)

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a grievance pursuant to Art. VII of the contract, alleging that his discharge was without just cause.² Plaintiff also filed

(Footnote Continued)

"1. The Company shall not discharge, discipline or suspend any employee (other than probationary employees) covered by this Agreement without just cause. Before any employee covered by this Agreement shall be disciplined, suspended or discharged, there shall be a notice given to the Union steward, and a copy forwarded to the Union.

2. A grievance by an employee claiming that he has been unjustly disciplined or discharged must be submitted to the Company in writing within three (3) days of discharge, suspension or discipline; otherwise, the same will be considered to have been made for just cause.

3. All warnings must be given in writing. A copy of such warning shall be given to the employee and the Union. If no grievance is written to dispute the warning within three (3) days of action, it will be assumed that the warning is justified."

²Arbitration proceedings were begun but not completed, having been adjourned at
(Footnote Continued)

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complaints of retaliatory discharge with the National Labor Relations Board and OSHA.³

In March 1984 plaintiff filed a complaint in the Law Division seeking compensatory and punitive damages. The complaint asserts that the actions of National in retaliation for reporting OSHA violations contravene both federal and state public policy. National filed a motion to dismiss or, in the alternative, for summary judgment contending the state tort cause of action was preempted by § 301 of LMRA. The motion was initially

(Footnote Continued)

plaintiff's request pending this appeal. As a result of our opinion, plaintiff's state court complaint will be reinstated. We would expect him to abandon his arbitration remedy.

³Action to these complaints has been deferred pending completion of the arbitration proceedings.

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denied. Following the subsequent decision of the Supreme Court of the United States in Allis-Chalmers v. Lueck, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), National successfully renewed its motion. Concluding that Allis was dispositive, the trial court held § 301 preempted plaintiff's cause of action. The court also concluded that even were there no preemption, contractual binding arbitration would be plaintiff's exclusive remedy.

I

We have not been hesitant in recognizing a common-law tort remedy for an employee whose discharge contravenes state law or public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). This has been particularly so where the discharge is in retaliation for the exercise of state rights and obligations. See

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Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988) (discharge of at-will employee in retaliation for requesting information relevant to suspected employment discrimination); Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd 85 N.J. 668 (1981) (discharge of at-will employee in retaliation for filing workers' compensation claim); Kalman v. Grand Union Co., 1983 N.J. Super. 153 (App. Div. 1982) (discharge of at-will pharmacist in retaliation for keeping pharmacy open contrary to employer's directive but as required by state rules). The question we must address here is whether a discharge in retaliation for reporting workplace safety violations is such a discharge and, if so, whether a tort remedy exists for an employee under a collective bargaining agreement as well as for an at-will employee.

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The right of all employees to safe and healthy working conditions is a matter of significant public concern and is guaranteed by both federal and state laws. On the federal level, the Occupational Health and Safety Act of 1970, 29 U.S.C. § 651 et seq., expresses congressional concern over a safe and healthy workplace for all workers. 29 U.S.C. § 651(b). It also reflects an awareness that workplace safety is a matter of substantial local interest as well. Thus, pursuant to 29 U.S.C. § 651(b)(11), states are encouraged "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws ..." and are expressly authorized to regulate health and safety of its workers provided that state standards are at least as vigorous as those required under OSHA. 29 U.S.C. § 667; 29 U.S.C. § 667(c)(2).

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On the state level, the Legislature has enacted the Worker Health and Safety Act, N.J.S.A. 34:6A-1 et seq., and the New Jersey Public -Employees' Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq., to ensure safe and healthy work environment. Guaranteeing to every worker the right to a safe place of employment, N.J.S.A. 34:6A-3 provides:

"Every employer shall furnish a place of employment which should be reasonable safe and healthful for employees. Every employer shall install, maintain and use such employer protective devices and safeguards ... as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required."

Indeed, this has long been a right protected by common law. Clayton v. Ainsworth, 122 N.J.L. 160 (E. & A. 1939); Davis v. N.J. Zinc Co., 116 N.J.L. 103 (E. & A. 1936); Burns v. Delaware and Del. Co., 70 N.J.L. 745 (E. & A. 1904); McDonald v. Standard Oil Co., 69 N.J.L.

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445 (E. & A. 1903); Canonico v. Celanese Corp. of America, 11 N.J. Super. 445 (App. Div. 1951), certif. den. 7 N.J. 77 (1951); Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516 (Ch. Div. 1976). Thus, when the Worker and Health Safety Act was enacted, the Legislature was careful to provide that it was not intended to affect in any way "any right or remedy ... existent at common law." N.J. S.A. 34:6A-17.

Unlike its federal counterpart, 29 U.S.C. § 660(c), the New Jersey Worker Health and Safety Act does not expressly prohibit penalizing an employee for filing complaints with either federal or state agencies in pursuance of the right to a safe workplace. However, the New Jersey Public Employees' Occupational Safety and Health Act, enacted in 1983, does expressly prohibit such misconduct. N.J.S.A.

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34:6a- 45. See also N.J.S.A. 34:5A-42 (prohibiting discrimination against an employee for claiming workers' compensation benefits). And recently the Legislature enacted the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., which codifies the right of all employees to pursue a state tort claim for action taken in retaliation for reporting violations of law to federal or state authorities or both. In this respect, N.J.S.A. 34:19-3 declares:

"An employer should not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or

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a rule or regulation promulgated pursuant to law by the employer; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

- (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
- (2) is fraudulent or criminal; or
- (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare ..."

Upon a violation, an employee or former employee may file a tort action and may be entitled to an injunction, reinstatement, compensation for lost wages and other benefits, punitive damages and counsel fees. N.J.S.A. 34:19-5. Clearly intended as comprehensive protective legislation, "employee" is broadly defined encompassing both union and nonunion employees. N.J.S.A. 34:19-2(b). Similarly, the definition of public body includes both

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federal and state entities. N.J.S.A. 34:19-2(c).

Although enacted after the retaliatory discharge here and, thus, not directly applicable, we view this legislation as a reaffirmation of this state's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a preexisting common-law tort cause of action for such retaliatory discharge. Cf. Lally v. Copygraphics, supra, 85 N.J. at 670.

National claims that since plaintiff reported the workplace safety violation to the federal agency, no state right or public policy is involved. The right to a safe workplace and corresponding right to report violations, however, is wholly independent of to whom a violation might be

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reported and, as previously set forth, is very much a matter of state concern. The employer's misconduct is the same whether the employee complains to a federal or state agency. Moreover, our concept of public policy has been broadly defined to include all legislation, administrative rules and regulations, and judicial decision, Pierce, supra, 84 N.J. at 72, with no artificial boundaries drawn between federal or state lines. Cf. Allen v. Commercial Casualty Insurance Co., 131 N.J.L. 475, 477-478 (E. & A. 1944).

National further contends that whatever might be the retaliatory discharge tort remedy for an at-will employee, it does not extend to an employee governed by a collective bargaining agreement establishing binding arbitration as the employee's remedy for an alleged unjust discharge. We fully recognize that both

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state and federal policy favor the use of arbitration where provided under a collective bargaining agreement. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 567-569, 80 S.Ct. 1343, 1346-1347, 4 L.Ed.2d 1403, 1406-1407 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-1353, 4 L.Ed.2d 1409, 1417-1418 (1960). See also Republic Steel Corp. v. Maddox, 379 U.S. 650, 652- 653, 85 S. Ct. 614, 616, 13 L.Ed.2d 580, 583 (1965). See Jorgensen v. Pennsylvania Railroad Co., 25 N.J. 541, 561-562 (1958).

Characterized as a procedure for resolving employment disputes through "a system of private law" designed to comply

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with the needs and desires of the parties, arbitration is a continuation of the collective bargaining process. United Steelworkers of America v. Warrior and Gulf Navigation Co., *supra*, 363 U.S. at 581, 80 S.Ct. at 1352, 4 L.Ed.2d at 1416-1417. Functions performed by an arbitrator "are not normal to the courts" and "considerations which help him fashion judgments may indeed be foreign to the competence of the courts." *Id.* Moreover, an arbitrator ordinarily cannot consider public interest, Thornton v. Potamkin Chevrolet, 94 N.J. 1, 5 (1983), and does not determine violations of law or public policy, *cf.* Bridgeton Ed. Assoc. v. Bd. of Ed. Bridgeton, 132 N.J. Super. 554, 557 (Ch. Div. 1975).

It is, thus, not surprising that the policy in favor of binding arbitration has not precluded judicial recourse for

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certain allegations of illegal conduct by an employer. McDonald v. City of West Branch, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (violations of civil rights); Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (racial discrimination); Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (violations of the Fair Labor Standards Act). See also Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. ___, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) (violations of Federal employees' Liability Act). These cases focus upon the nature of the rights being vindicated through the judicial remedy. Because they are substantive non-waivable rights of all workers, separate and distinct from rights created by the collective bargaining agreement, judicial recourse is permitted

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notwithstanding the existence of binding arbitration. Cf. Thornton v. Potamkin Chevrolet, supra, 94 N.J. at 5 (arbitration under collective bargaining agreement for alleged racially motivated layoff does not bar administrative complaint with the Division on Civil Rights).

We think the same considerations pertain to the right of a worker in our state to a safe and healthy workplace and the corresponding right to be free from retaliatory action therefor. These rights do not derive from the bargaining process. Firmly grounded in statute and public policy, they are rights applicable to all workers. Resolution of alleged employer misconduct in violation of these rights does not, moreover, implicate any "private law" of the parties to the contract or "considerations which are foreign to the competence of the courts." Rather the

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trial would simply consist of plaintiff's establishing a prima facie case that he was in fact fired for filing OSHA complaints and National would then have to demonstrate he was fired for another, non-pretextual reason.

Furthermore, we think it evident an at-will employee would have an available tort remedy for a retaliatory discharge for reporting workplace safety violations. We do not think other, perhaps similarly situated, employees should be denied the same remedy simply because they are members of a union. Cf. Herring v. Prince Macaroni of New Jersey, 799 F.2d 120, 123-124 (3rd Cir. 1986) ("we think it is unlikely where the [New Jersey] legislature has declared an employment practice unlawful as to all employees, and the courts have recognized an action at law to enforce that declaration, that contractual

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employees as a class would, or could, be relegated to any remedies provided under their collective bargaining agreements for the selfsame illegal practices").

We consider our decision in Lally v. Copygraphics, supra, 173 N.J. Super. 162 instructive. Plaintiff in Lally alleged a discharge in retaliation for pursuing workers' compensation benefits and sought to litigate her claim in the state court. Much like plaintiff here who has an available arbitration remedy, plaintiff in Lally had an available administrative remedy. In concluding that the availability of such a remedy did not exclude the right of judicial action for compensatory and punitive damages, we said:

"... we regard the policy of the retaliatory discrimination act as one so firmly grounded in the public interest as to require assiduous protection and enforcement. Employer conduct which undermines employee resort to worker's compensation benefits has been characterized by

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the leading commentator as a matter of "opprobrium" and as employer misconduct which is "particularly repellent" ... We agree and consequently conclude ... that such conduct by an employer constitutes both a public and a private wrong, each of which is entitled to vindication ..."
173 N.J. Super. at 179-180 (citations omitted).

Similarly, in affirming our determination that judicial remedy was not precluded by the existence of the administrative remedy, the Supreme Court viewed a retaliatory discharge for pursuing statutory rights as "wrongful and tortious" for which there existed a common-law cause of action which was "strongly grounded in public policy". 85 N.J. at 670.

No less can be said of the firing of an employee for doing nothing more than exercising his or her statutory right to a safe and healthy workplace. Such employer's conduct, clearly designed to thwart the employee's right to work in a safe and healthy environment, is

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abhorrent. It is a public wrong because it strikes against the fabric of our laws concerning workplace safety. It is, as well, a private wrong against the individual employee. The remedy, moreover, of reinstatement, available through arbitration, may serve little or no deterrent purpose and may have minimal effect if the employee chooses not to return to an employer who has resorted to such conduct. We therefore conclude that an employee has a common law cause of action for wrongful and tortious retaliatory conduct by the employer which may be pursued in lieu of contractual arbitration. Midgett v. Sackett-Chicago, Inc., 105 Ill.2d 143, 85 Ill. Dec. 475, 478-479, 473 N.E.2d 1280, 1283-1284 (Sup. Ct. 1985), cert. den. 472 U.S. 1032, 105 S.Ct. 3513, 87 L.Ed.2d 642 (1985) (union employee has tort action independent of available arbitration

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remedy for discharge in retaliation for pursuing workers' compensation benefits). Accord Peabody Galion v. Dollar, 666 F.2d 1309, 1320-1323 (10th cir. 1982), Puchert v. Agsalud, 67 Haw. 25, 677 P.2d 449 (1984), appeal dismissed for want of substantial federal question, Pan American World Airways v. Puchert, 472 U.S. 1001, 105 S.Ct. 2693, 86 L.Ed.2d 710 (1985).

II

National contends any state remedy plaintiff might have is preempted by § 301 of the LMRA, 29 U.S.C. § 185. That statute provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties ..."

§ 301 does not expressly preempt state regulation in the field of labor law.

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Neither has Congress exercised its authority to occupy the entire field. Preemption, therefore, arises only when state regulation frustrates the federal policy expressed in § 301 that relationships created by collective bargaining agreements in the private sector should be defined by federal common law. Allis Chalmers Corp. v. Lueck, 471 U.S. at 209, 211, 105 S.Ct. at 1910-1911, 85 L.Ed.2d at 213-214, 215 (1985). As observed in Allis:

"The interest in interpretive uniformity and predictability that requires that labor-contract disputes be resolved by reference to federal law also requires that the meaning given a contract phrase or terms be subjected to uniform federal interpretation . . ." 471 U.S. at 211, 105 S.Ct. at 1911, 85 L.Ed.2d at 215.

Accordingly, those disputes which must be resolved under federal common-law arise under and relate to the intended meaning and interpretation of labor clauses

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together with the consequences of their breaches. It is only those disputes which are preempted by § 301.

Private parties to collective bargaining agreements however, do not have the power through § 301 to "preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Allis, 471 U.S. at 212, 105 S.Ct. at 1912, 85 L.Ed.2d at 216. Thus § 301 does not preempt "every dispute concerning employment or tangentially involving a provision of a collective-bargaining agreement". Id. 471 U.S. at 211, 105 S.Ct. at 1911, 85 L.Ed.2d at 215. And those state laws proscribing conduct or establishing rights and obligations that exist independently of private agreements and that can not be waived or altered by agreement of private parties are not preempted. Id., 471 U.S. at 212,

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105 S.Ct. at 1912, 85 L.Ed.2d at 216. Cf. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S.Ct. 2380, 85 L.Ed.2d 728, 751 (1985) (federal labor law "interstitial, supplementing state law [including state laws affecting occupational health and safety] where compatible, and supplanting it only where it prevents the accomplishment of the purpose of the federal act").

Whether § 301 will preempt a state law claim, thus, must depend upon an analysis of the particular claim and its relationship to and dependence upon terms of the contract. In Allis, for example plaintiff filed a state tort cause of action for bad-faith handling of an insurance claim. The claim, however, arose under a disability plan included in the collective bargaining agreement. The allegation of bad-faith handling depended

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upon an interpretation of the contract concerning the intended manner of handling claims and whether the employer's conduct complied with what the parties had intended at the time the disability plan was negotiated. Plainly, the state tort claim involved a right created by contract and was inextricably intertwined with considerations of terms of the contract and intention of the parties. It was, therefore, preempted. See also International Brotherhood of Electrical Workers, AFL-CIO v. Hechler, 481 U.S. ___, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987) (state tort claim of breach by union of its alleged contractual duty to provide employee with safe workplace was dependent upon interpretation of collective bargaining contract to ascertain existence of duty, its nature and extent, and therefore was preempted by § 301).

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In contrast, the right of employees to a safe workplace and the corresponding right to report violations are grounded in state and federal law. They are rights held by all workers independent of any collective bargaining agreement. Providing a judicial forum for the vindication of these rights does no violence to the balance between labor and management achieved through collective bargaining. And a claim of retaliatory action taken against the exercise of those rights requires no analysis or interpretation of any terms of the collective bargaining agreement.

We recognize the contract does have a "for-cause" discharge clause which includes a provision for binding arbitration. Facially a retaliatory discharge of the type here could be considered a "not-for-cause" discharge and thus within the

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binding arbitration provision of the contract. Yet plaintiff's claim of retaliatory discharge does not in any way turn even tangentially upon an interpretation of either the "for-cause" contractual claim or any other clause in the contract. There has been no claim by National for instance, that a retaliatory discharge could be considered "for-cause" under the contract. Moreover, as previously indicated, at trial plaintiff will attempt to present a prima facie case that he was fired for reporting the workplace safety violations and in its defense National Tool will attempt to demonstrate another non-pretextual reason. Whatever that other reason might be, however, there will be no need to determine whether it constitutes a "for-cause" discharge under the contract.

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Providing plaintiff with a state tort remedy, thus, will do no harm to the private interests of the parties to the collective bargaining agreement or to the policy of § 301 that disputes involving those interests should be resolved under uniform federal common law. It will, on the other hand, give full recognition to the strong state policy against penalizing an employee's efforts to exercise safe workplace rights.

Preemptive effect of § 301 in the context of discharges in retaliation for the exercise of state rights has been the subject of numerous federal decisions. State tort remedies have been held not preempted by the following: Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987) (discharge in retaliation for refusing to perform work in violation of state OSHA standards); Baldracchi v. Pratt &

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Whitney Aircraft Div., 814 F.2d 102 (2nd Cir. 1987) cert. denied, ___ U.S. ___, 108 S.Ct. 2819, ___ L.Ed.2d ___ (discharge in retaliation for filing a workers' compensation claim); Herring v. Prince Macaroni of N.J., Inc., 799 F.2d 120 (3rd Cir. 1986) (discharge in retaliation for filing workers' compensation claim); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. den. 471 U.S. 1099, 105 S.Ct. 2319, 85 L.Ed.2d 839 (1985) (discharge in retaliation for reporting adulterated milk to local health department); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (discharge in retaliation for filing workers' compensation claim); Sutton v. Southwest Forest Industries, 643 F. Supp. 662 (D. Kansas 1986) (discharge in retaliation for workers' compensation claim); Orsini v. Echlin, Inc., 637 F. Supp. 38 (N.D. Ill. 1986)

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(discharge in retaliation for workers' compensation claim); Benton v. Kroger Co., 635 F. Supp. 56 (S.D. Texas 1986) (discharge in retaliation for workers' compensation benefits). See also LaBuhn v. Bulkmatic Transport Co., 644 F. Supp. 942 (N.D. Ill. 1986) (discharge in retaliation for exercise of contractual grievance rights preempted, discharge in retaliation for unsafe workplace complaint not preempted). Cf. Pan American World Airways v. Puchert, 472 U.S. 1001, 105 S.Ct.2693, 86 L.Ed.2d 710 (1985) (dismissing for want of substantial federal question appeal from decision of Supreme Court of Hawaii, Puchert v. Agsalud, 67 Haw. 25, 677 P.2d P.2d 449 (1984) that discharge in retaliation for workers' compensation claim not preempted by the Railway Labor Act.

Focusing upon the particular retaliatory tort of discharge for workers'

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compensation claims, for example, the court said in Baldracchi:

"In contrast to the tort in Allis-Chalmers, Baldracchi's suit is independent of the collective bargaining agreement. Her claim of retaliation for filing a workers' compensation claim does not turn on interpretation of that agreement. At trial, Baldracchi would have to present a prima facie case that she was in fact fired for filing a workers' compensation claim. See 2A A. Larson, The Law of Workmen's Compensation 68.36(c) (1986). In its defense, Pratt & Whitney would have to demonstrate that Baldracchi was fired for another, non-pretextual reason." 814 F.2d at 105.

Although decided before Allis, Garibaldi similarly analyzed the nature of the claim involved:

"Garibaldi's 'whistle blowing' to protect the health and safety of the citizens of California is exactly the type of conduct that the California Supreme Court protected in Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 164 Cal Rptr. 839, 610 P.2d 1330 (1980)]. The Supreme Court's decision in Farmer v. United Brotherhood of Carpenters and Joiners, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 388 (1977)] rested explicitly on the 'State's interest in protecting the health and well-being of its citi-

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zens." 430 U.S. at 303, 97 S.Ct. at 1065. See also Malone v. White Motor Corp., 435 U.S. 497, 513 n. 13, 98 S.Ct. 1185, 1194 n. 13, 55 L.Ed.2d 443 (1978); Teamsters Union v. Oliver, 358 U.S. 283, 297, 79 S.Ct. 297, 305, 3 L.Ed.2d 312 (1959).

Garibaldi's allegation that he was discharged in violation of public policy comports with the limitations of the Farmer holding. As in Farmer, Garibaldi's claim is a "function of the ... manner" in which the conduct was exercised "rather than a function of the ... [conduct] itself." 430 U.S. at 305, 97 S.Ct. at 1066. In contrast, if Garibaldi had alleged that he was terminated in violation of the collective bargaining contract, or, based on Cleary v. American Airlines, [111 Cal. App.3d 443, 168 Cal. Rptr. 722 (1980)], in violation of an implied covenant not to terminate without cause, the result might be otherwise." 726 F.2d at 1374-1375.

The recent decision of the Ninth Circuit in Paige reflects a like analysis. In Paige employees were fired for refusing to fill generator gas tanks under circumstances creating hazardous conditions in violation of the state occupational and safety act. They filed a state court

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complaint alleging in part wrongful discharge in violation of the state OSHA and wrongful discharge in violation of an implied covenant of good faith and fair dealing. Recognizing that the latter claim depended entirely upon terms and conditions of the collective bargaining agreement, the court found that claim preempted. On the other hand, the claim of wrongful discharge in violation of state OSHA was not preempted. That claim arose from alleged violations of state statutes and public policy. As the court noted:

"... California's OSHA regulations protect all workers, irrespective of any labor agreement. State health and safety standards benefit all employees as individual workers, not because they are or are not members of a collective bargaining association. And California's interest in providing this private cause of action is the enforcement of the underlying statute or policy, not to regulate the employment relationship ... " 826 F.2d at 863.

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Thus, a claim of retaliatory discharge similar to the type of claim involved in this case was found not preempted.

National relies upon Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir., 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 226, 98 L.Ed.2d 185 (1988), and Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986), both of which held § 301 preempts a state tort cause of action for discharge in retaliation for filing workers' compensation claim. Viewing such claims as claims for wrongful discharge under the collective bargaining agreement, both courts concluded they were substantially dependent upon an analysis of the just-cause provision in the contract. 823 F.2d at 1046. As observed by the dissent in Lingle, however:

"... Not only does the court ignore the grey areas on the legal landscape, but it even refuses to draw a "black and white" line between

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federal and state authority. Instead, it opts, as a practical matter, for a single-colored portrait of absolute federal authority ...” 823 F.2d at 1051.

Nothing in § 301 supports “absolute federal authority”, and we concur with the further observations of the dissent that:

“... the majority simply fails to realize that Allis-Chalmers requires a far more focused analysis than the one undertaken by the court. We are not asked in this case to determine whether all state law claims for wrongful discharge are within the preemptive ambit of § 301.. In analyzing the preemptive effect of § 301, the general tort of wrongful discharge must be distinguished from the tort of retaliatory discharge for having sought the protection of a state’s workers’ compensation scheme. In the general wrongful discharge claim, the cause of action may well be premised on activity directly covered by the collective bargaining agreement.... However, in the present retaliatory discharge claim, the cause of action arises from the state’s important public policy interest- independent of the collective bargaining agreement- in preserving its workers’ compensation system.” 823 F.2d at 1053.

We agree that the analysis required under Allis was not conducted in Lingle.

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Neither was it conducted in Johnson. We decline to follow their precedence.

We do not suggest that all complaints labelled wrongful discharge should escape preemption. Thus, in McQuitty v. General Dynamics Corp., 204 N.J. Super. 514 (App. Div. 1985), we noted that the particular claim of wrongful discharge based upon an alleged violation of a written or oral labor contract should have been brought under § 301 and resolved by reference to federal law. 204 N.J. Super. at 520. Although dictum, that observation was entirely consistent with Allis since the claim of breach of employment agreement derived wholly from terms and conditions of plaintiff's employment, express or implied, a resolution of which depended upon analysis of those terms and condi-

APPENDIX B

tions.⁴ It is this type of wrongful discharge which is characterized in Allis as being traditionally resolved through contractual arbitration. 471 U.S. at 219, 105 S.Ct. at 1915, 85 L.Ed.2d at 251. See also Bale v. General Telephone Co. of Calif., 795 F.2d 775 (9th Cir. 1986) (claims for breach of oral contract and negligent misrepresentation at time of hiring preempted); Olguin v. Inspiration Consolidated Cooper Co., 740 F.2d 1468 (9th Cir. 1984) (claims for breach of contract and discharge without just or progressive discipline preempted).

⁴Plaintiff in McQuitty also claimed retaliatory discharge for filing a workers' compensation claim. That part of the complaint was not dismissed by the trial court and thus was not involved in the appeal. See 204 N.J. Super. at 518. Our discussion of the preemptive effect of § 301, therefore, relates only to the claim of breach of contract.

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Neither do we suggest that all claims of retaliatory discharge escape preemption. See DeSoto v. Yellow Freight Systems, 811 F.2d 1333 (9th Cir. 1987) (retaliatory discharge for refusal to operate a trailer with expired registration and vehicle plate preempted where no state statute, regulation or policy involved); Olguin v. Inspiration Consolidated Cooper Co., supra, 740 F.2d 1468 (retaliatory discharge for reporting safety complaints preempted where no state laws, regulation or policies are involved).

But whatever Congress may have intended with respect to federal rights and preemption, it clearly did not intend preemption to apply to a retaliatory discharge claim that is based upon independent state rights and obligations, the judicial resolution of which will not

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require analysis of any contractual terms or conditions and which will do no violence to the collective bargaining process. Plaintiff's allegation that he was discharged because he exercised his state right to report workplace safety violations is such a claim. It is our conclusion that it is not preempted by § 301.

III

National's final contention is that plaintiff's complaint is preempted by the federal Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. Since this issue was not considered by the trial court, we need not address it. E.g. Skripek v. Bergamo, 200 N.J. Super. 620, 629 (App. Div. 1985), certif den. 102 N.J. 303 (1985). In any event, we find no merit to it.

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OSHA does not reflect express congressional intent to preempt the field of occupational safety and health. To the contrary, as previously indicated, OSHA specifically permits individual states to adopt a scheme of health and safety regulations along with enforcement procedures so long as such standards are at least as vigorous as those required by OSHA and have been approved by the Secretary of Labor, 29 U.S.C. § 667(b), (c). Beyond that, OSHA gives states express authority to regulate areas of health and safety not governed by an OSHA standard, 29 U.S.C. § 667(a). Thus, preemption under OSHA arises only where a state law or regulation concerns an occupational safety and health matter governed by a specific federal standard and only where an approved state plan is not in effect. See

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N.J. State Chamber of Commerce v. Hughey,
774 F.2d 587, 593 (3rd Cir. 1985).

National argues that this limited form of preemption under OSHA extends to a state tort remedy for retaliatory discharge because OSHA contains a prohibition against such discharge, an administrative remedy therefor, and authorizes the Secretary to bring enforcement proceedings in federal district court. In this respect, 29 U.S.C. § 660(c)(1) and (2) provide:

"(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with

APPENDIX B

the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

OSHA, thus, does prohibit retaliatory discharges and establishes enforcement procedures encompassing a remedy therefor. It does not, however, by its express terms prohibit a state from providing an aggrieved employee an alternative remedy. To the contrary, permitting an employee to pursue a state tort remedy is entirely consistent with the overall congressional intent of encouraging states to "assume the fullest responsibility for the

APPENDIX B

administration and enforcement of their occupational safety and health laws" 29 U.S.C. § 651(b)(11). See Cerracchio v. Alden Leeds Incorporated, 223 N.J. Super. 435 (App. Div. 1988) (holding OSHA does not preclude an employee from pursuing a tort action for a retaliatory discharge). See Kilpatrick v. Delaware County Soc., 632 F. Supp. 542, 548 (E.D.Pa. 1986). Cf. Paige v. Henry J. Kaiser Co., supra, 826 F.2d at 864.

National argues a different result is required by Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) and Wolk v. Saks Fifth Ave. Inc., 728 F.2d 221 (3rd Cir. 1984). Both cases are inapposite.

In Taylor, plaintiff filed a complaint of retaliatory discharge with OSHA pursuant to 29 U.S.C. § 660(c)(2). The Secretary of Labor investigated and determined not to file suit. Plaintiff

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then filed his own suit in federal court alleging a discharge in violation of § 660(c)(1). Based upon an analysis of the congressional history on § 660, the court concluded Congress did not intend that it be enforced by private parties. Thus, only the Secretary of Labor is authorized to file a complaint alleging a violation of § 660(c)(1). Accord, McCarthy v. Bark Perking, 676 F.2d 42 (2nd Cir. 1982), vacated and remanded on other grounds, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983); King v. Fox Grocery Co., 642 F. Supp. 288 (W.D.Pa. 1986); Holmes v. Schneider Power Corp., 628 F. Supp. 937 (W.D.Pa. 1986), aff'd 806 F.2d 252 (3rd Cir. 1986).

The complaint here, however, does not seek to remedy a violation of OSHA. Rather, as discussed previously, plaintiff seeks to remedy a retaliatory discharge in

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violation of state laws and public policy. It is entirely distinct from a § 660(c)(1) private cause of action. See Holmes v. Schneider Power Corp., 628 F. Supp. at 939 (drawing a similar distinction but finding no state common law cause of action for retaliatory discharge). See also Kennard v. Zimmer, 632 F. Supp. 635 (E.D.Pa. 1986).

Wolks v. Saks Fifth Ave Inc., supra, 728 F.2d 221, is similarly inapposite. Based on Pennsylvania law, the Third Circuit affirmed a dismissal of plaintiff's wrongful discharge complaint because there existed an available state administrative remedy. As construed by the Third Circuit, under that state's wrongful discharge law, a common law cause of action exists only where the employee has no available statutory remedy. Our wrongful discharge law, on the other hand, contains

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no such limitation. Moreover, Wolk simply does not address the issue of OSHA preemption.

We find nothing in OSHA either express or implied that requires preemption of plaintiff's common law cause of action. Kilpatrick v. Delaware County Soc., supra, 623 F. Supp. at 549. National's contention that plaintiff's claim is preempted, thus, is rejected.

IV

For the reasons set forth in this opinion, we reverse the dismissal of plaintiff's complaint and remand for further proceedings.

ADDENDUM

We previously noted at p. 479 that the Supreme Court of the United States granted ceriorari in Lingle v. Norge Div.

APPENDIX B

of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987). On June 6, 1988, subsequent to the filing of our opinion, the Supreme Court reversed the Court of Appeals decision in Lingle and held § 301 of the LMRA, 29 U.S.C. § 185, does not preclude an employee covered by a collective bargaining agreement from pursuing a state tort remedy for discharge in retaliation for filing a workers' compensation claim. Lingle v. Norge Division of Magic Chef, Inc., ___ U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). This principle applies equally to a discharge in retaliation for reporting workplace safety violations.

APPENDIX C

APPENDIX C - ORDER OF THE SUPERIOR COURT
OF NEW JERSEY, LAW DIVISION

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY
DOCKET NO. L-020496-84

VINCENT LePORE,

Plaintiff,

vs.

NATIONAL TOOL AND MANUFACTURING
COMPANY,
Defendant.

CIVIL ACTION - ORDER

This matter being opened to the Court upon Motion by counsel for defendant, National Tool and Manufacturing Company, Lum, Hoens, Abeles, Conant & Danzis (Wayne J. Positan, Esq. appearing) on notice to counsel for plaintiff, Vincent LePore,

APPENDIX C

Farley & Farley (Charles Farley, Jr., Esq. appearing), for an Order seeking dismissal of the Complaint for failure to state a claim upon which relief can be granted or, in the alternative, for Summary Judgment and the Court having reviewed the papers submitted, and having heard oral argument of counsel, and good cause having been shown,

IT IS on this 12 day of July, 1985,

ORDERED that the Motion of counsel for defendant for Summary Judgment in favor of defendant is hereby granted.

/s/John M. Boyle,
John M. Boyle, J.S.C.

PAPERS CONSIDERED:

 Notice of Motion
 Movant's Affidavits
 Movant's Brief
 Answering Affidavits
 Answering Brief
 Cross-Motion
 Movant's Reply
 Other

APPENDIX D

APPENDIX D - RELEVANT STATUTES

The United States Code, 29 U.S.C.

§ 651 provides:

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

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(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that

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occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in

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accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problems;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

(Pub.L. 91-596, § 2, Dec. 29, 1970, 84 Stat. 1590.)

APPENDIX D

APPENDIX D - RELEVANT STATUTES

The United States Code, 29 U.S.C.

§ 185 provides:

§ 185. Suits by and against labor organisations.

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent;
entity for purposes of suit;
of money judgments enforcement

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judg-

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ment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, and (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such

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other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301,
61 Stat. 156.

OCT 11 1989

JOSEPH F. SPANIOLO, JR.
CLERK

(2)
NO. 89329

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NATIONAL TOOL AND MFG. CO.,
PETITIONER,

V.

VINCENT LEPORE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION.

VINCENT LEPORE
PRO-SE
RESPONDENT
169 SYCAMORE AVE.
FREEHOLD, N.J.
07728

55/142

QUESTIONS PRESENTED

The decision of the N.J. Supreme Court, which affirmed the decision of the Appellate Division of N.J. Superior Court, addressed the Questions Presented by the respondent. The Appellate Division of N.J. Superior Court correctly stated that the Questions Presented in this action are the following:

"...(1) whether there exists a tort remedy for the discharge of a union employee in retaliation for reporting workplace safety violations to the Occupational Safety and Health Administration;

(2) whether state court litigation of such retaliatory discharge is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA);

(3) whether state court litigation of such retaliatory discharge is preempted by the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (OSHA)."

224 N.J. Super. at 466.

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No. 89329

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NATIONAL TOOL AND MFG. CO.,
Petitioner,

v.

VINCENT LEPORE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

The respondent requests that the Supreme Court of the United States deny the petition for writ of certiorari seeking review of the decision of the N.J. Supreme Court. The decision of the N.J. Supreme Court is reported at 115 N.J. 226 (1989).

STATEMENT

The N.J. Supreme Court, in affirming the decision of the Appellate Division of N.J. Superior Court, correctly ruled that an employee under a collective bargaining agreement may seek redress in state court for a discharge in retaliation for reporting workplace safety violations. The ruling further held that a tort remedy for such a retaliatory discharge is not preempted by either Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 or the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq.

REASONS FOR DENYING THE WRIT

The respondent will explain three (3) reasons why the petitioner has not provided any arguments of substance that would be a prerequisite for the U.S. Supreme Court to grant a request for a re-

view on a writ of certiorari. First, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court is in conflict with any applicable decisions of the U.S. Supreme Court. Second, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court is in conflict with the decisions of other state courts of last resort or the courts of federal appeals. And third, the petitioner has not demonstrated any instance where the ruling of the N.J. Supreme Court has raised any new arguments pertaining to federal law.

In addition to, and explained within, the three (3) mentioned reasons, the U.S. Supreme Court should deny the request for a review on a writ of certiorari, because the petitioner has not demonstrated the ability to properly state the Questions Presented on the record. The Questions

Presented in the petition for a writ of certiorari are not the questions on the record. The Questions Presented by the respondent are the questions on the record.

Both the N.J. Supreme Court and the Appellate Division of N.J. Superior Court were not exactly presented those Questions Presented by the petitioner. The Questions Presented by the petitioner do not accurately describe the action addressed in the decision of the N.J. Supreme Court, and in the decision of the Appellate Division of N.J. Superior Court. The respondent's action is not properly stated.

By not accurately stating the Questions Presented in the petition for a writ of certiorari, the petitioner fails to properly address the rulings of the N.J. State Courts. The arguments of the petitioner are not clear. Therefore, because the arguments of the petitioner are not accurate, the petition for a writ of certiorari should be denied.

1 The Ruling Rendered By The New Jersey
Supreme Court Does Not Conflict With Any
Applicable Decisions Of The United States
Supreme Court

The ruling rendered by the N.J. Supreme Court, which affirmed the decision of the Appellate Division of N.J. Superior Court, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), does not conflict with any applicable decisions of the U.S. Supreme Court. The petitioner has not demonstrated any instance where the ruling rendered by the N.J. Supreme Court is in conflict with any U.S. Supreme Court decision.

The principles from U.S. Supreme Court decisions were applied in the rulings of the N.J. State Courts. These principles serve as the basis for the consistency of the decisions in the U.S. Supreme Court. See, Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1910; Lingle v.

Norge Div. of Magic Chef, Inc., 108 S.
Ct. 1877 (1989).

The rulings of the N.J. State Courts noted that federal common law, as referenced in the decision in the case of Allis Chalmers Corp. v. Lueck, requires two (2) instances for preemption. The first instance concerns state regulations and federal policy. The second instance concerns federal policy involving relationships covered by the collective bargaining agreement in the private sector.

The rulings of the N.J. State Courts proved that the respondent's tort claim was based on state public policy, enforcing the state right to a safe and healthy workplace. The respondent's common law cause of action stands independent of the collective bargaining agreement. This is not an action on employer and union agreements or contractual provisions. The right for this action exists independent of the

collective bargaining agreement. The contract is not in dispute, but the retaliatory discharge for exercising a state right is. The rulings of the N.J. State Courts annunciated the premise that parties cannot contract for what is illegal, and public policy illegalities cannot be addressed in contract. Therefore, no preemption exists. The Appellate Division of N.J. Superior Court stated the following:

"In contrast, the right of employees to a safe workplace, and the corresponding right to report violations are grounded in state and federal law. They are rights held by all workers independent of any collective bargaining agreement. **Providing** a judicial forum for the **vindication** of these rights does no violence to the balance between labor and management achieved through collective bargaining. And a claim of retaliatory action taken against the exercise of those rights requires no analysis or interpretation of any terms of the collective bargaining agreement." 224 N.J. Super. at 476.

The Appellate Division of N.J. Superior Court further stated the following:

"Providing plaintiff with a state tort remedy, thus, will do no harm to the private interests of the parties to the collective bargaining agreement or to the policy of 301 that disputes involving those interests should be resolved under uniform federal common law. It will on the other hand, give full recognition to the strong state policy against penalizing an employee's efforts to exercise safe workplace rights." 224 N.J. Super. at 477.

The decision of the U.S. Supreme Court, in the case of Allis Chalmers Corp. v. Lueck, emphasized the independent nature of a state right. The U.S. Supreme Court stated the following:

"In extending the pre-emptive effect of 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 105 S. Ct. at 1912.

Similarly, the U.S. Supreme Court decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. held that a state tort claim is not preempted by Section 301 of the Labor Management Relations Act (LMRA),

29 U.S.C. § 185, if it stands independent of the contract. The claim can proceed, as long as no interpretation of the collective bargaining agreement is required.

The N.J. Supreme Court, in referencing the U.S. Supreme Court's decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., ruled that the respondent's cause of action has an independent basis in state law. The N.J. Supreme Court stated the following:

"As Lingle makes clear, a suit based on an independent state cause of action does not undermine a collective bargaining agreement." 115 N.J. at 228.

The rulings of the N.J. State Courts are consistent with three (3) principles held in the U.S. Supreme Court's decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. First, the rulings of the N.J. State Courts demonstrated that the claim did not depend on the meaning of the collective bargaining agreement.

Second, the rulings of the N.J. State Courts satisfied the requirement that the state claim can proceed, as long as no contractual interpretation was necessary, even if the same factual considerations were addressed. And third, the rulings of the N.J. State Courts were in line with the principle that judges interpret public policy, while arbitrators interpret contracts.

As in line with the decision of the U.S. Supreme Court in the case of Lingle v. Norge Div. of Magic Chef, Inc., the rulings of the N.J. State Courts, allowing the respondent to proceed with action, does no harm to the balance of the contract, nor does it interfere with any administrative remedy under the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. The public policy of the State of N.J. is the source of an independent action separate from that of a con-

tract.

The U.S. Supreme Court recognized the consistency of the decision in the case of Lingle v. Norge Div. of Magic Chef, Inc. with that of other decisions on the same matter. The U.S. Supreme Court stated the following:

"(c) The result in this case is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements, and with cases that have permitted separate fronts of substantive rights to remain unpre-empted by other federal labor law statutes. Interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements. There is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." 108 S. Ct. at 1878.

The respondent has demonstrated that the principles that serve as the basis

for the consistency of the decisions of the U.S. Supreme Court have been applied in the rulings of the N.J. State Courts. The ruling of the N.J. Supreme Court is consistent with U.S. Supreme Court decisions.

2 The Decision Of The New Jersey Supreme Court Is Not In Conflict With The Decisions Of Other State Courts Of Last Resort Or The Courts Of Federal Appeals

The ruling of the N.J. Supreme Court is not in conflict with the decisions of other state courts of last resort or the courts of federal appeals. The petitioner has not demonstrated any instance where the decision of the N.J. Supreme Court is in conflict with the decisions of other state courts of last resort or the courts of federal appeals. The rulings by the N.J. State Courts, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), are in line with U.S. Supreme Court decisions, as well as consistent with the decisions of other state courts of last resort and the courts of federal appeals.

The consistency of the decisions on both the state courts of last resort

level and the circuit court of appeals level, as well as the consistency of the decisions by the U.S. Supreme Court, whose principles are applied to the two (2) mentioned levels, was referenced by the rulings of the N.J. State Courts in the respondent's state action. It should be noted that when referencing the consistency of the decisions of the state courts of last resort and the courts of federal appeals, it is necessary to include additional U.S. Supreme Court decisions which either upheld or maintained this consistency. The consistency in these decisions is based on the principle that state claims concerning discharges in violation of a state right are not preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 or the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq. See, Herring v. Prince Macaroni-

of New Jersey, Inc., 799 F. 2d 120 (3rd Cir. 1986): Baldracchi v. Pratt and Whitney Aircraft Div., United Tech., 814 F. 2d 102 (2nd Cir. 1987): Peabody Galion v. Dollar, 666 F. 2d 1309 (10th Cir. 1981): Garibaldi v. Lucky Food Stores, Inc., 726 F. 2d 1367 (9th Cir. 1984), cert. den. 471 U.S. 1099, 105 S. Ct. 2319, 85 L. Ed. 2d 839 (1985); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 85 Ill. Dec. 475, 473 N.E. 2d 1280, (Sup. Ct. 1985), cert. den. 472 U.S. 1032, 105 S. Ct. 3513, 87 L. Ed. 2d 642 (1985): Pan American World Airways v. Puchert, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985): Puchert v. Agsalud, 67 Haw. 25, 677 P. 2d 449 (1984): Paige v. Henry J. Kaiser Co., 826 F. 2d 857 (9th Cir. 1987).

The rulings of the N.J. State Courts displayed consistency with decisions that state no preemption by § 301 of the LMRA exists for common law tort causes of ac-

tion for employees covered by a collective bargaining agreement. The decisions cited by the N.J. State Courts maintained the principle that public policy rights cannot be bargained away. Arbitration is not accepted in the State of N.J. as a deterrent in protecting public policy rights. See, Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); Barrantine v. Arkansas Best Freight Systems, Inc., 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

The N.J. State Courts referenced the Third Circuit Court of Appeals decision, in the case of Herring v. Prince Macaroni of N.J., Inc., in order to depict a discriminatory analysis should the employee covered by a collective bargaining agreement be denied a basic public policy right to a safe and healthy workplace. The Appellate Division of N.J. Superior Court referred to the Third Circuit Court of

Appeals decision on the matter:

"Furthermore, we think it evident an at-will employee would have an available tort remedy for a retaliatory discharge for reporting workplace safety violations. We do not think other, perhaps similarly situated, employees should be denied the same remedy simply because they are members of a union. Cf. Herring v. Prince Macaroni of New Jersey, 799 F. 2d 120, 123-124 (3rd Cir. 1986) ('we think it is unlikely where the (New Jersey) legislature has declared an employment practice unlawful as to all employees, and the courts have recognized an action at law to enforce that declaration, that contractual employees as a class would, or could, be relegated to any remedies provided under their collective bargaining agreements for the selfsame illegal practices')." 224 N.J. Super. at 473.

The rulings of the N.J. State Courts are also consistent with a Second Circuit Court of Appeals decision in the case of Baldracchi v. Pratt and Whitney Aircraft Div., United Tech... The decision of the Second Circuit Court of Appeals referenced the U.S. Supreme Court's decision to deny a grant for a petition for a writ of cer-

toriari in the case of Pan American World Airways v. Puchert, which was an appeal from a decision of the Supreme Court of the State of Hawaii in the case of Puchert v. Agsalud. The Second Circuit Court of Appeals stated the following:

"The United States Supreme Court dismissed the appeal for want of a substantial federal question. If the Hawaii law were preempted by the R.L.A., the case would necessarily have presented the Court with a substantial federal question." 814 F. 2d at 106.

The decision of the Supreme Court of the State of Hawaii, as referenced by the Second Circuit Court of Appeals, was similar to the Third Circuit Court of Appeals decision in the case of Herring v. Prince Macaroni of N.J., Inc.. The Second Circuit Court of Appeals maintained consistency in the principles of its decision by displaying a discriminatory analysis should the employee covered by a collective bargaining agreement be denied a state right. The Second Circuit Court of Appeals stated the

following:

"In an analagous circumstance, the Supreme Court⁹ stated, 'It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on non-union employers.' Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S.Ct. 2380, 2398, 85 L. Ed. 2d 728 (1985)." 814 F. 2d at 107.

The Supreme Court of the State of Hawaii stated in the case of Puchert v. Agsalud that a wrongful discharge claim was not preempted by the collective bargaining agreement or federal labor laws. Even though the considerations for dispute resolution concerning the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq., were similar, if not more stringent, to the National Labor Relations Act (NLRA), § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq., the Supreme Court of the State of Hawaii ruled that state statutes prohib-

iting unlawful discharge are a matter of state concern. The Supreme Court of the State of Hawaii stated the following:

"Thus, Puchert's only means of having his cause of action heard is through the administrative and judicial procedures prescribed by state statute. Furthermore, the state statute on which Puchert relies in advancing his unlawful discharge claim is not pre-empted by the R.L.A.. The state has a substantial interest in the welfare of workers who are injured in the course of their employment and to see that they are not penalized for pursuing remedies granted to them by statute. Such regulation by the state does not interfere with the scheme and purpose of the R.L.A.." 667 P. 2d at 456.

The decision of the Second Circuit Court of Appeals, in the case of Baldracchi v. Pratt and Whitney Aircraft Div., United Tech., further maintained consistency by stating that a cause of action based on the law of the State of Connecticut could not be preempted. The Second Circuit Court of Appeals stated the following:

"...the right under the Connecticut statute is absolute and cannot be waived." 814 F. 2d at 103.

The decision by the Supreme Court of the State of Illinois, in the case of Midgett v. Sackett-Chicago, Inc., also displayed consistency. The Supreme Court of the State of Illinois stated the following in depicting a discriminatory analysis:

"We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contractual remedy the employee may have based on the collective bargaining agreement." 473 N.E. 2d at 1283.

The ruling of the N.J. Supreme Court is also consistent with the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. The three (3) principles concerning preemption, annunciated by the Tenth Circuit Court of Appeals, were applied in the

rulings of the N.J. State Courts.

The first "rationale" concerned the "supremacy clause principle". This principle addresses congressional intent. The rulings of the N.J. State Courts effectively displayed how congressional intent via the OSHA regulations encouraged states to "adopt" a scheme of safety and health in the workplace, and to implement whatever enforcement mechanisms were necessary to ensure those standards.

The second "rationale" concerned the "primary jurisdiction theory". The rulings of the N.J. State Courts clearly satisfied the requirements of this principle by proving that a state public policy action can proceed, as long as no interpretation of the collective bargaining agreement is required.

The third preemption "standard" concerned the "frustration test". This standard examined the intent being asserted

by the state and evaluates the effect on federal labor policies. The rulings of the N.J. State Courts have demonstrated that a state action, enforcing state public policy rights, stands independent of the terms and conditions of the collective bargaining agreement, which represents federal labor policies.

Similar to the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar was a Ninth Circuit Court of Appeals decision in the case of Garibaldi v. Lucky Food Stores, Inc. It should be noted, that both of the just mentioned consistent decisions were prior to the U.S. Supreme Court decision in the case of Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), which displayed a similar consistency. The Ninth Circuit Court of Appeals determined that a state cause of action, based on public

policy, stands independent of the employment relationship. The Ninth Circuit Court of Appeals stated the following:

"Thus, it is clear that California's interest in providing a cause of action for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship." 726 F. 2d at 1347.

The principles concerning preemption have been proven to be consistent. The evolution of cases concerning preemption, up to and including the U.S. Supreme Court decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877 (1988), have maintained consistency with these principles.

As mentioned in the first section, concerning the consistency of the N.J. Supreme Court ruling with U.S. Supreme Court decisions, the rulings of the N.J. State Courts were consistent with the principles in the decision of the U.S.

Supreme Court in the case of Lingle v. Norge Div. of Magic Chef, Inc... One important principle of that particular U.S. Supreme Court decision being that a state claim can proceed, as long as no contractual interpretation was necessary, even if the same factual considerations were addressed. This principle of consistency, as has been displayed, was evidenced in the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. The Tenth Circuit Court of Appeals had claimed that despite similarities, a state cause of action based on public policy rights can proceed, as long as it is independent of the workings of the LMRA. The Tenth Circuit Court of Appeals, in referencing the consistency of the U.S. Supreme Court's decisions in the cases of Alexander v. Gardner-Denver Co. and Barrentine v. Arkansas Best Freight Systems, Inc., stated the following on

the matter:

"In the Barrentine decision, the Supreme Court recognized the unsuitability of non-contractual disputes for binding resolution in accordance with procedures established by collective bargaining. The Court said '(w)hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.' Id. at 737, 101 S.Ct. at 1443. The Court further said, quoting from Gardner-Denver, '(t)he distinctly separte nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly, no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.' Id. at 728, 101 S.Ct. at 1447.

It is thus apparent that the contention of Peabody that the arbitration clause bars this action is wholly lacking in merit." 666 F. 2d at 1322-1323.

The N.J. Supreme Court ruling was also consistent with the Ninth Circuit Court of Appeals decision in the case of Palge v. Henry J. Kaiser Co. The N.J. State Courts

referenced the case to further analyze the enforcement of state public policy concerning workplace safety and health. The Ninth Circuit Court of Appeals determined that no preemption exists for a retaliatory discharge enforcing public policy. The Appellate Division of N.J. Superior Court referenced the following from that decision:

"As the Court noted:

'...California's OSHA regulations protect all workers, irrespective of any labor agreement. State health and safety standards benefit all employees as individual workers, not because they are or are not members of a collective bargaining association. And California's interest in providing this private cause of action is the enforcement of the underlying statute or policy, not to regulate the employment relationship...' 826 F. 2d at 863." 224 N.J. Super. at 479.

Similarly, the rulings of the N.J. State Courts have maintained consistency by properly determining that both classes

of employees, at-will and those covered by a collective bargaining agreement, should have equal access to common law rights for a safe and healthy workplace. Providing a common law remedy for both classes of employees allows the State of N.J. to maintain a balance in enforcement and deterrence. The Appellate Division of N.J. Superior Court stated the following:

"To the contrary, permitting an employee to pursue a state tort remedy is entirely consistent with the overall congressional intent of encouraging states to 'assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws...' 29 U.S.C. § 651(b) (11). See Cerracchio v. Alden Leeds Incorporated, 223 N.J. Super. 435 (App. Div. 1988) (holding OSHA does not preclude an employee from pursuing a tort action for a retaliatory discharge). See Kilpatrick v. Delaware County Soc., 632 F. Supp. 542, 548 (E.D.Pa. 1986). Cf. Paige v. Henry J. Kaiser Co., *supra*, 826 F. 2d at 864." 224 N.J. Super. at 483.

The N.J. Supreme Court properly ruled that the State of N.J. is obligated, as a

matter of public policy, to carry out and enforce the scheme of federal and state safety and health regulations. The common law remedy is utilized by the State of N.J. to ensure the federal objective of safety and health in the workplace. The wrongful discharge tort is the State of N.J.'s enforcement mechanism, independent of OSHA's administrative remedy, against a retaliatory discharge for exercising a state right to a safe and healthy workplace.

The Third Circuit Court of Appeals decision in the case of N.J. State Chamber of Commerce v. Hughey, 774 F. 2d 587 (3rd Cir. 1985), also recognized the role of the **state** in enforcing safety and health standards. The Third Circuit Court of Appeals stated the following:

"29 U.S.C. § 667(a). The statute provides that states may develop and enforce 'standards relating to any occupational safety or health issue with re-

spect to which a Federal standard has been promulgated'..."
774 F.2d. at 592.

The N.J. Supreme Court ruling was consistent with the Third Circuit Court of Appeals decision in the case of N.J. State Chamber of Commerce v. Hughey. The Appellate Division of N.J. Superior Court, in referencing the Third Circuit Court of Appeals decision, stated the following:

"To the contrary, as previously indicated, OSHA specifically permits individual states to adopt a scheme of health and safety regulations along with enforcement procedures so long as such standards are at least as vigorous as those required by OSHA and have been approved by the Secretary of Labor, 29 U.S.C. 667(b), (c). Beyond that, OSHA gives states express authority to regulate areas of health and safety not governed by an OSHA standard, 29 U.S.C. 667(a). Thus preemption under OSHA arises only where a state law or regulation concerns an occupational safety and health matter governed by a specific federal standard and only where an approved state plan is not in effect. See N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 593 (3rd Cir. 1985)." 224 N.J. Super. at 482.

The consistency of the decisions of the state courts of last resort and the courts of federal appeals serve as a strong foundation upon which respondent will demonstrate that petitioner's arguments are without merit. Petitioner has not presented any argument of substance.

Petitioner attempts to bring before the U.S. Supreme Court distorted arguments in a failed attempt to bring about a scene of conflict. In fact, it is in the flawed arguments of the petitioner that additional justification is evidenced for the rulings of the N.J. State Courts.

The N.J. State Courts were already presented the same arguments concerning the cases of Wolk v. Saks Fifth Ave. Inc., 728 F. 2d 221 (3rd Cir. 1984); Braun v. Kelsey-Hayes Co., 635 F. Supp. 75 (E.D. Pa. 1986); Olguin v. Inspiration Con-

solidated Copper Co., 740 F. 2d 1468 (9th Cir. 1984); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960). The allegedly conflicting decisions of the cases relied on by the petitioner are distinguishable on the facts. The cases are also distinguishable by the law. The misstated facts by the petitioner in these cases have already been clarified by the rulings of the N.J. State Courts.

The rulings of the N.J. State Courts addressed all the arguments of the petitioner. The N.J. State Court rulings reviewed other cases in evaluating the petitioner's arguments. The N.J. State Court rulings answered all of the petitioner's questions.

Petitioner has once again displayed a twisted interpretation of the decisions in the cases of Wolk v. Saks Fifth Ave. Inc. and Braun v. Kelsey-Hayes Co.. The facts concerning these cases are different. The decisions in these cases concern the limitations of the wrongful discharge law of the State of Pennsylvania. Relying on these limitations, the petitioner argues that a common law cause of action can only take place when an employee has no statutory remedy. The public policy of the State of Pennsylvania is different. In the State of Pennsylvania, a common law cause of action can proceed only if no statutory remedy exists. However, the wrongful discharge law of the State of N.J. does not have that limitation. The subject of discussion in the petitioner's arguments is not preemption, but individual state concerns. **The basis for the application of a wrongful discharge law**

is a matter of state concern.

Contrary to the petitioner's arguments, the Appellate Division of N.J. Superior Court noted that the decision in the case of Wolk v. Saks Fifth Ave. Inc. does not address the OSHA preemption issue. However, the decision in the case of Kilpatrick v. Delaware County Soc., 623 F. Supp. 542 (E.D.Pa. 1986), as referenced by the Appellate Division of N.J. Superior Court, did address the issue of OSHA preemption. The decision in the case of Kilpatrick v. Delaware County Soc. determined that a common law cause of action in the State of Pennsylvania is not preempted by OSHA. The decision in the case of Kilpatrick v. Delaware County Soc. stated the following:

"Moreover, neither the Third Circuit nor the Pennsylvania Supreme Court has explicitly held that the existence of a federal remedy for adverse discrimination by an employer preempts Pennsylvania common law actions for wrongful

termination." 623 F. Supp. at 549.

Petitioner has again mistakenly referred to the decision in the case of Olguin v. Inspiration Consolidated Copper Co. Petitioner claims that the public policy of the State of N.J. is void because the remedy afforded by OSHA is exclusive. In this particular case, the petitioner claims that the Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 24, was the sole remedy for discharge. The decision in that case determined that claims for retaliatory discharges for reporting safety complaints cannot take place, unless state laws, regulations, and policies are involved. The decision in that case noted that no specific statutes or policies were referenced in the State of Arizona. Unlike the State of N.J., the State of Arizona chooses not to enforce federal laws. The decision in

the case of Olguin v. Inspiration Consolidated Copper Co. stated the following:

"Arizona has little interest in enforcing federal law, even if that federal law is incorporated, as Olguin suggests, in the state's general public policy." 740 F. 2d at 1475.

The State of N.J. does not have this limitation on its wrongful discharge law.

Again, the subject of discussion in the petitioner's arguments is not preemption, but individual state concerns.

As explained before, the retaliatory discharge law of the State of N.J. is the enforcement mechanism for public policy. Laws and regulations are among the sources of the State of N.J.'s public policy. To further emphasize the public policy of the State of N.J., the Appellate Division of N.J. Superior Court stated the following:

"Moreover, our concept of public policy has been broadly defined to include all legislation, administrative rules and regula-

tions, and judicial decisions, Pierce, supra, 84 N.J. at 72, with no artificial boundaries drawn between federal or state lines. Cf. Allen v. Commercial Casualty Insurance Co., 131 N.J.L. 475, 477-478 (E. and A. 1944)." 224 N.J. Super. at 471.

The N.J. State Court rulings noted that the State of N.J. has a strong common law tradition concerning safety and health in the workplace. It is this strong common law tradition that serves as a source of the State of N.J.'s public policy. In the decision in the case of Lingle v. Norge Div. of Magic Chef, Inc., the U.S. Supreme Court recognized the development of common law as an expression of a state's public policy. The U.S. Supreme Court stated the following:

"Illinois courts have recognized the tort of retaliatory discharge for filing a worker's compensation claim, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 23 Ill. Dec. 559, 384 N.E. 2d 353 (1978),⁶ and have held that it is applicable to employees covered by union con-

tracts, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 85 Ill. Dec. 475, 473 N.E. 2d 1280 (1984), cert. denied, 474 U.S. 909, 106 S.Ct. 278, 88 L.Ed. 2d 243 (1985).

6. Although the cause of action was not based on any specific statutory provision, the following section of the Illinois Worker's Compensation Act expresses the public policy underlying the common-law development:..."

108 S.Ct. at 1881-1882.

Petitioner once again refers to the decisions in the cases of United Steelworkers of America v. American Manufacturing Co., United Steelworkers of America v. Enterprise Wheel and Car Corp., and United Steelworkers of America v. Warrior and Gulf Navigation Company in claiming that the exclusive remedy is arbitration. The rulings of the N.J. State Courts properly dismissed this argument. The federal policy of arbitration concerns the collective bargaining agreement. State public policy concerns

a state right. The rulings of the N.J. State Courts referenced the decisions of the U.S. Supreme Court in the cases of Alexander v. Gardner-Denver Co. and Barrentine v. Arkansas Best Freight Systems, Inc. in distinguishing the system of "private law" from that of "public law". Arbitrators address the "law of the contract", not the "law of the land". State public policy rights do not have a source in contract, but in state law. Arbitrators cannot consider public policy matters. As mentioned before, in examining the decision of the Tenth Circuit Court of Appeals in the case of Peabody Galion v. Dollar, state action enforcing a state public policy right stands independent of the terms and conditions of the collective bargaining agreement which represents federal labor policies.

Petitioner's presentation of the decision in the case of Zombro v. Baltimore

City Police Department, 868 F. 2d 1364 (4th Cir. 1989) is completely baseless. The decision in that case concerned a dispute involving whether a cause of action had a source as a federal constitutional right or a federal statutory right. The decision in that case has absolutely no relevance, whatsoever, to a common law cause of action for wrongful discharge based on state public policy.

Petitioner's final arguments rely on the decision in the case of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), in another distorted attempt to claim that the rulings of the N.J. State Courts have upset federal policy. In the decision in the case of Peabody Galion v. Dollar, the Tenth Circuit Court of Appeals examined the decision in the case of San Diego Building Trades Council v. Garmon when evaluating the three (3) principles concerning pre-

emption. The Tenth Circuit Court of Appeals emphasized the fact that the U.S. Supreme Court has maintained that the "Garmon doctrine" must yield when a state considers a matter of being of significant interest. Again, the State of N.J. has a strong common law tradition concerning workplace safety and health. The wrongful discharge tort is the State of N.J.'s enforcement mechanism, standing independent of the terms and conditions of the collective bargaining agreement and standing independent of OSHA's administrative remedy, for exercising a state right to a safe and healthy workplace. The Tenth Circuit Court of Appeals stated the following on the matter:

"The Supreme Court has discouraged the inflexible application of the Garmon doctrine, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten undue interference with the federal

regulatory scheme. Farmer v. United Brotherhood of Carpenters, supra, 430 U.S. at 290, 97 S.Ct. at 1058; The Court has recognized exceptions to the preemption doctrine in cases that fulfill the just mentioned standard." 666 F. 2d at 1315.

The U.S. Supreme Court's decision in the cases of Allis Chalmers Corp. v. Lueck and Lingle v. Norge Div. of Magic Chef, Inc., have further applied the principles concerning preemption as displayed in the Tenth Circuit Court of Appeals decision in the case of Peabody Galion v. Dollar. Petitioner's arguments relying on the decision in the case of San Diego Building Trades Council v. Garmon fail.

The rulings of the U.S. Supreme Court are to be controlling in the decisions of the state courts of last resort and the courts of federal appeals. The N.J. Supreme Court is the ultimate authority as to state law. The N.J.

State Courts correctly ruled on the issues.

The basis for the application of a wrongful discharge law is a matter of state concern. Although the basis for the application may vary from state to state, that determination by itself does not give rise to conflict. This is where the petitioner continually misses the point. Public policy differs from state to state as a matter of state concern. The respondent's common law cause of action is one concerning state law. The N.J. Supreme Court has made a ruling concerning state law.

The N.J. Supreme Court ruling is consistent with U.S. Supreme Court decisions respective of individual state concerns. In filing a petition for writ of certiorari, the petitioner is not contesting the ruling of the N.J. Supreme Court, but rather the principles of the applicable

U.S. Supreme Court decisions, which allows the N.J. State Supreme Court ruling to stand. In essence, the petitioner has filed an application requesting that the U.S. Supreme Court review its decisions. The petitioner's filing of a petition for writ of certiorari is without merit. The petitioner's request for a writ of certiorari should be denied.

The respondent has demonstrated that the well reasoned ruling of the N.J. Supreme Court is consistent with the decisions of other state courts of last resort and the courts of federal appeals. The decision of the N.J. Supreme Court is not in conflict with the decisions of other state courts of last resort or the courts of federal appeals.

3 The New Jersey Supreme Court Ruling
Does Not Raise Any New Arguments Per-
taining To Federal Law

The ruling of the N.J. Supreme Court, in the case of Vincent Lepore v. National Tool and Mfg. Co., 115 N.J. 226 (1989), 224 N.J. Super. 463 (1988), does not raise any new arguments pertaining to federal law. Petitioner's arguments, in the filing of a petition for writ of certiorari, introduces nothing that hasn't already been addressed in the rulings of the N.J. State Courts or in the decisions of the U.S. Supreme Court. The U.S. Supreme Court should deny the petition for writ of certiorari for want of a substantial federal question.

CONCLUSION

The respondent requests the U.S. Supreme Court to deny the petition for a writ of certiorari.

VINCENT LEPORE
PRO-SE
RESPONDENT

Dated: October 6, 1989